FILE COPY

Office-Supreme Court, U.S.
FILED
FEB 11 1960
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

---------- TERM, 1960

NUMBER 698

HOWARD BRANKLIN CHAPMAN
Petitioner in Certiorari

vs.

UNITED STATES OF AMERICA

Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

SCOTT WALTERS, JR.
GUY R. DUNN
G. SEALS AIKEN
2783 N. Main Street
East Point, Georgia

IN THE

SUPREME COURT OF THE UNITED STATES

HOWARD BRANKLIN CHAPMAN
Petitioner in Certiorari

vs.

UNITED STATES OF AMERICA

Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

Now comes, Howard Branklin Chapman, petitioner in certiorari, and petitions this Honorable Court for the writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

Petitioner were indicted by the United States Grand Jury for the Northern District of Georgia, on a two count indictment. Count number 1, charged, "That, on

or about November 21, 1957, in the Atlanta Division of the Northern District of Georgia, HOWARD BRANKLIN CHAPMAN, did unlawfully, willfully and knowingly have and possess 21, 100-pound bags of sugar, and 20 pounds of yeast, the same being property intended for use in the manufacture and production of non-tax-paid distilled spirits, and being intended for use in violation of the Internal Revenue Laws with respect to such distilled spirits, in violation of Section 5686, Internal Revenue Code of 1954." Count two (2) charged petitioner "That, on or about November 26, 1957, in the Atlanta Division of the Northern District of Georgia, HOWARD BRANKLIN CHAPMAN, did unlawfully, willfully and knowingly have and possess 20, 100-pound bags of sugar, 20 pounds of yeast and 125 pounds of rye meal, the same being property intended for use in the manufacture and production of non-tax-paid distilled spirits, and being intended for use in violation of the Internal Revenue Laws with respect to such distilled spirits, in violation of Section 5686, Internal Revenue Code of 1954."

Petitioner was placed on trial before a jury.

The evidence on behalf of the government centered around a bakery located at 1146 Euclid Avenue, N. E., Atlanta, Georgia, and a house known as the residence of the defendant at 471 Page Avenue, N. E. Atlanta, Georgia.

In October, 1957, an investigation involving this defendant was begun by the Alcohol Tobacco Tax Unit.

One of the agents, namely, Charles H. Weems, Jr. called the Little Five Points Bakery and asked to purchase some sugar. Then on October 24, Mr. Weems went

to the Little Five Points Bakery and went inside and talked with Mr. Chapman, the petitioner, about buying some sugar.

On November 7, investigator Denny and Weems went back to the Bakery owned by Mr. Chapman, as President, and known as "Little Five Points Bakery, Inc." and again approached the petitioner Mr. Chapman, about some sugar.

Again on November 21, investigator Weems and Denny went back to the bakery to see Mr. Chapman, about the purchase of sugar. Later, approximately one week having elapsed investigator Denny and Weems went back to see Mr. Chapman, at his home, 471 Page Avenue, N. E. Atlanta, Georgia, in an attempt to purchase some sugar, and they continuousuly persisted, until they talked the petitioner into selling them some sugar, which was in the amount of 20 bags of 100-pounds each, making a total purchase of 2,000 pounds, which was actually not purchased from the defendant, but taken from him as evidence by agents, Denny, Weems, Scoggins and Strasser. Also at this time the agents took without the consent of the rightful owner, 20 pounds of yeast and 125 pounds of Rye Meal, according to what they term the items, by the agents, which could not have been anything other than pumpernickle flour, according to the petitioner.

All of the amounts stated were disputed by petitioner with the exception of the sugar.

The defendant pleaded entrapment during his entire trial and stated, that he had no intentions or knowledge of any one going to make liquor out of any of the mate-

rials, and that he had never sold any materials to bootleggers, or any other persons known to him to make non-tax-paid liquor from any of his materials, and the defendant put his character in issue to prove that he was a law abiding citizen and had not violated the law previously, and challanged the government to prove his bad character if any he had, which they failed to do.

At the conclusion of the evidence in chief on behalf of the Government, the defendant through his counsel moved for a judgment of acquittal, which the court (trial) did not rule upon, but took the same under advisement, and which said trial court did not rule on, up to and until the date of sentencing at which time said motions were overruled.

Also the Honorable John Stokes, Jr. Assistant United States Attorney General, made the statement to the court, that in view of the evidence, and the law as charged by the court, that he would not agree to it, but felt that the court should grant a judgment of acquittal, and this was refused by the trial court, and the court of Appeals for the Fifth Circuit stated, that the charge by the court was a fair charge.

When the jury returned its verdict of not-guilty on count one, and the verdict of guilty of count two, defense counsel immediately made a motion for judgment of acquittal notwithstanding the verdict, and as to this motion the trial Judge, took the same under advisement, and the same was not ruled on up to and until the day of sentencing, at which time the Court's attention was called to the Motions made, and the Court stated that it was overruling all of the motions, and at that time the trial Judge, placed your petitioner on probation.

JURISDICTION

(A) The judgment of the Court of Appeals was entered on November 10, 1959. A petition for rehearing was denied December 17, 1959. The jurisdiction of the Supreme Court of the United States is invoked under rules, as set forth, in the brief which accompanies this application for a Writ of Certiorari.

The United States Court of Appeals for the Fifth Circuit, in affirming the conviction of petitioner, ruled that "The question of entrapment was submitted to the jury upon a charge which was, in our opinion, a fair and clear statement of the law on the subject."

A petition for rehearing was filed by petitioner, and denied by the United States Court of Appeals.

(B) The statutes of the United States, the validity of which are involved in this application for certiorari, are as follows:

(a) Internal Revenue Code of 1954, Section 5686.

(b) This petition for certiorari is being filed in this court within 30 days from the date of the extension granted by Associate Justice Hugo L. Black, as provided for under the rules of the Supreme Court of the United States.

(c) The nature of the case and the rulings of the Court were such as to bring this case within the jurisdictional provisions relied upon, and the grounds upon which it is contended that the questions involved are substantial are as follows:

1.

The United States Court of Appeals for the Fifth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court.

2.

The United States Court of Appeals for the Fifth Circuit has misconstrued a decision of this Court involving a construction of a statue of the United States, and has, by its ruling, permitted the conviction of a person, without correctly construing previous decisions of this court on the defense of entrapment, and the correct meaning as laid down by this court, to determine whether or not the defense of entrapment was involved in any case.

3.

The United States Court of Appeals for the Fifth Circuit has decided a question of gravity and importance in the administration of federal criminal justice involving, the question of entrapment, and the admissability of transcription of conversation between the officers, and the defendant, in the original trial, the petitioner in this matter. Also as to the admissibility of admissions made by petitioner to the officers, and as to how identify of a person to a telephone conversation may be made.

4.

The United States Court of Appeals for the Fifth Circuit has misconstrued the decision of this Court in the case of Weinstein vs. United States 293 F. 388, and by the decision in United States vs. 2265 One Gallon Paraffined Tin Cans etc., Cumby, Claimant, which is in itself, a 5 Circuit, 1958, reported 260 F. 2d 105. By making

a decision in the Cumby case, and then following the same in the case herein before the court, the Court of Appeals for the Fifth Circuit, has made errors, and has erred, which said rulings by the Fifth Circuit Court of Appeals, should be cleared up by this court.

THE QUESTIONS PRESENTED

1. The United States Court of Appeals for the Fifth Circuit erred in deciding that there was ample evidence upon which the jury could find appellant guilty of possessing the sugar, rye and yeast, and that this property was intended for use in violating the provisions of law quoted in the Internal Revenue Code of 1954, being Section 5686, where the evidence clearly shows that no one knew the mind of the petitioner in this case, and no evidence other than what the petitioner contends should not have been admitted namley the type transcription of conversations, shows that petitioner knew anything of what would happen to said sugar, or other materials, even though he was chartered by the Superior Court of Dekalb County, Georgia, to have the same in his possession and to sell the same.

2. The Court of Appeals erred in deciding and ruling that there were sufficient facts and circumstances to identify the petitioner as the person with whom the telephone conversation with Agent Kelley was had, when the record of the trial court, fails to bear out this contention whatsoever, when the same could easily be ascertained by reading of the record itself.

3. The Court of Appeals erred in deciding and ruling that every step in the making of the transcription was

carefully safeguarded by the officers, and if their testimony was to be believed, the transcript offered to the jury was a true and correct reproduction of what was said by the participants in these proceedings. The court ruled this, without going into whether or not the defendant in the original trial was present during all of the time the recorder was being used, or whether the evidence was obtained without his knowledge or consent, or whether or not the same was an original or had been retaped time and time again, all of this could have been ascertained by studying of the record, but the ruling of the court indicates that the record was not studied as completely as it should have been to administer justice. To further point this out a quotation from the ruling of the court in this case is as follows: "It is significant that the appellant, (meaning the petitioner herein) did not except to the charge when given or when a similar charge was given by the court in response to a question by a juror," when in fact the record will show that said charge was expected to by counsel for the defendant, in the original trial.

4. The Court of Appeals erred in overlooking the controlling principle of this case, to-wit: That the government stated that the jury would be forced to return a not-guilty verdict. That the defendant could not have been found not-guilty on one count and guilty on the other count.

5. The Court of Appeals erred in not passing on the question of a new and different charge to a jury, and specifically "It is important that a jury reach a verdict if it is possible." "That the jury room is no place for pride of opinion." "That they should listen to each

others arguments and if a much larger number are for a verdict of guilty the ascenting juror should consider." This fact within itself could show that an opinion was expressed to such an extent that it would influence a jury, and thereby deprive the petitioner of a fair and impartial trial.

6. The Court of Appeals erred in not passing on the question of whether or not the jury had a right to pass on the question of whether or not it was Mr. Kelley to whom the petitioner talked, all of this type of evidence should have been passed on by the trial Judge, and the Court of Appeals erred in not examing the record for the same when it was made part of the questions laid before that court.

7. The Court of Appeals erred in not passing on the question of whether or not one agent for the Government could state what another agent ask any defendant.

8. The Court of Appeals erred in not reversing the trial court and giving directions to enter a Judgment of Acquittal for the petitioner, who was the defendant in the original trial.

APPENDIX

Petitioner herein append to this petition a copy of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

SCOTT WALTERS, JR.
GUY R. DUNN
G. SEALS AIKEN

Attorneys for Petitioner
2783 N. Main Street
East Point, Georgia

JUDGMENT

Extract from the Minutes of November 10, 1959.

HOWARD BRANKLIN CHAPMAN,

No. 17650. versus

UNITED STATES OF AMERICA

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

ORDER DENYING REHEARING

Extract from the Minutes of December 17, 1959.

HOWARD BRANKLIN CHAPMAN,

No. 17650. versus

UNITED STATES OF AMERICA

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same hereby denied.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17650

HOWARD BRANKLIN CHAPMAN,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

(November 10, 1959.)

Before HUTCHESON, CAMERON and JONES, Circuit Judges.

CAMERON, Circuit Judge: Appellant Chapman was indicted and tried on a two count indictment charging him with willfully and knowingly possessing sugar and rye meal which were intended for use in the manufacture and production of nontaxpaid distilled spirits in

violation of §5686 of the Internal Revenue Code of 1954.[1] The jury acquitted him on the first count and convicted him on the second, and imposition of sentence was suspended for one year during which he was placed upon probation; from this judgment he prosecutes this appeal, assigning a large number of alleged errors of the court below.

These may be grouped into the contentions that the evidence was not sufficient to warrant the conviction, that he was a victim of entrapment, and that certain evidence was wrongfully admitted consisting of testimony of a telephone conversation and the submission of a tape recording to the jury.

Chapman was in the baking business and the federal investigators, having received reliable information that sugar for making bootleg whiskey was being sold by him, started an undercover investigation to determine whether this was true. Two of the agents posed as bootleggers. Their first approach to appellant was by telephone conversation, which was followed by visits on the part of the officers. The officers advised him that they desired the sugar for use in connection with their moonshine liquor still and the question of delivery was discussed. Appellant suggested that the officers use a dealer's tag on their truck, but they declined, countering with the

[1] §5686. (b) "Penalty for having, possessing, or using liquor or property intended to be used in violating provisions of this chapter.—It shall be unlawful to have or possess any liquor or property intended for use in violating the provisions of this chapter, or regulations prescribed thereunder, or which has been so used, and every person so having or possessing or using such liquor or property, shall be liable to a fine not to exceed $5,000 or to imprisonment for not more than 1 year, or both."

suggestion that appellant place his own tag on the officers' truck, which was done. They discussed also what disposition the officers would make of the empty bags and appellant was satisfied when he was advised that they would be burned.

Appellant drove the officers' truck, bearing his tag, to the wholesale establishment and brought back to them twenty-one bags of sugar, which he sold them for $12.25 a bag, representing a profit of $3.00. The officers also purchased twenty pounds of yeast for $8.00.

About five days later one of the officers telephoned appellant asking to purchase fifteen bags of sugar, but appellant suggested that the number be increased to thirty-five, and they finally compromissed on a deal for twenty-five bags of sugar plus two bags of rye meal and twenty pounds of yeast, all of these being ingredients commonly used in making bootleg liquor. Appellant suggested that the delivery be not made at his bakery, but that the officers come to his house after dark, which they did.

While the officers were engaged in transferring the sugar from appellant's truck to their own, along with the rye meal and yeast which appellant had brought from his house, two other federal agents, by preamrangement, arrived on the scene and asked appellant what was going on. He told them that he was moving the sugar to one of his bakeries and that he had employed the two undercover agents for this purpose. He stated that he did not know their names and that he had never sold them any sugar or had any dealings with them prior to that date. He was

thereupon arrested. He made certain admissions to the officers while en route to town.

Most of the foregoing testimony given by the government agents was denied by appellant and the Government, in rebuttal, introduced a recording made by the officers with a small wire recorder which was secreted on one of them.

From this brief outline it is clear that there was ample evidence upon which the jury could find appellant guilty of possessing the sugar, rye and yeast which was in the process of being loaded when he was arrested, and that this property was intended for use in violating the provisions of law quoted in Footnote 1 *supra*.

We think there can be no doubt about the admissibility of the admissions made by appellant to the officers or that there were sufficient facts and circumstances to identify appellant as the person with whom the telephone conversation with Agent Kelley was had. Cf. *Enzor v. United States*, 5 Cir., 1958, 262 F.2d 172, certiorari denied 354 U.S. 953. The same is true as to appellant's blanket charge that the "District Court erred time and again by permitting prejudicial and irrelevant evidence," the record references not bearing out appellant's contentions in any degree.

Appellant urges his objections to reception in evidence of the transcription of conversations between the officers and appellant on the occasions when they were bargaining for or receiving delivery of the sugar, as made by a recording device secreted under the shirt of one of the

agents. Every step in the making of the transcription was carefully safeguarded by the officers, and if their testimony was to be believed, the transcript offered to the jury was a true and correct reproduction of what was said by the participants in these proceedings. The court inquired diligently into the various steps and satisfied itself that the proffered transcription was free from suspicion as to its authenticity, and the transcription was played before the jury under strict admonition of the court that the jury was to ascribe to it only such weight as it merited under all of the circumstances in evidence. At the end of the playing of the recording appellant moved for a mistrial on the ground that the evidence was highly prejudicial. The court denied the motion, but again instructed the jury to observe caution in considering the contents of the tape recording and in rejecting anything which was not said in the presence of the appellant. We think that the recording was admissible and that the court below properly handled the entire matter with the jury.

The question of entrapment was submitted to the jury upon a charge which was, in our opinion, a fair and clear statement of the law on the subject. *Demos v. United States*, 5 Cir., 1953, 205 F.2d 596, certiorari denied 346 U.S. 873; *Hamilton v. United States*, 5 Cir., 1955, 221 F.2d 611; *Rodriguez v. United States*, 5 Cir., 1955, 227 F.2d 912; *Kivette v. United States*, 5 Cir., 1956, 230 F.2d 749.[2] It is significant that the appellant did not except to the charge when given or when a similar charge was given by the court in response to a question by a juror.[3]

[2] These excerpts present the gist of this portion of the charge: "Now, it is the contention of the defendant in this case that he was entrapped into the sale of this sugar and that therefore,

We have considered the large number of errors specified by the appellant and find them without merit and that the case was well tried in the court below and that its judgment ought to be and it is

AFFIRMED.

---

he should not be held accountable for any violation that is found to have resulted in such sale. Now, in that connection I instruct you that officers of the United States many [sic] not induce persons who would not otherwise have committed the crime to violate the laws and then prosecute for it. Sound public policy and decent fairness forbid it. It is not, therefore properly speaking the entrapment of a criminal that the law frowns on but the seduction by its officers to commit crime.

"Now, the gest [sic] of the defense of entrapment is the conception of the crime by the Government's agents for the purpose of porsecuting the defendant, the latter not having any previous intention to commit it. A money consideration or any other adequate motive insighted [sic] by the agent to enduce [sic] the crime may constitute entrapment, provided the conception of the criminal design originated with the Government agent and was planted by him in the mind of the accused who otherwise would not have committed the offense. . . . I instruct you that if you find in this case that the sugar was intended for use in the production of nontaxpaid whiskey and if you further find that the defendant, Mr. Chapman, had knowledge of that fact at the time he possessed it and had it in his possession, then you would look to the evidence and see whether he was induced to possess sugar so intended for illicit use, and if you find from the evidence that the inception of the crime originated in the minds of the federal officers and not in the mind of the defendant and that that thought and idea was placed in Mr. Chapman's mind by the officers and that he was induced by the officers to commit the offense, then you would return a verdict of not guilty because that may not be done. The officers may not conceive a crime and induce someone to commit it and then prosecute for it."

3 In connection with several points intermingled in appellant's argument heavy reliance is placed upon Kott v. United States, 5 Cir., 1947 163 F.2d 984, and Shively v. United States, 4 Cir., 1954, 210 F.2d 131, but a reading of the cases fails to reveal that they sustain any of appellant's contentions. He argues at various points in the brief that it was not sufficient that appellant pos-

sessed the sugar with the intention of distributing it into bootleg channels, but that the purchasers must have had the intention so to use it. No convincing authority is cited for this proposition and the law is to the contrary. Cf. Weinstein v. United States, 1 Cir., 1923, 293 F. 388; and United States v. 2265 One Gal. Paraffined Tin Cans etc., Cumby, Claimant, 5 Cir., 1958, 260 F.2d 105, quoting on p. 108 from Weinstein supra: "We think the intention referred to in the statue . . . is that of the seller alone . . ."

A true copy

Test: EDWARD W. WADSWORTH

Clerk, U. S. Court of Appeals, Fifth Circuit

New Orleans, Louisiana

FILE COPY

Office-Supreme Court, U.S.
FILED
MAR 11 1960
JAMES R. BROWNING, Clerk

No. 696

In the Supreme Court of the United States

OCTOBER TERM, 1959

HOWARD BRANKLIN CHAPMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM R. WILKEY,
Assistant Attorney General,
BEATRICE ROSENBERG,
FELICIA DUBROWSKY,
Attorneys,
Department of Justice, Washington 25, D.C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Argument	5
Conclusion	8

CITATIONS

Cases:

Allen v. *United States*, 164 U.S. 492 7
Masciale v. *United States*, 356 U.S. 386 6
On Lee v. *United States*, 343 U.S. 747 7
Sorrells v. *United States*, 287 U.S. 435 6
Weinstein v. *United States*, 293 Fed. 388 5

Statute:

26 U.S.C. 5686(a) 2, 5

542979—60

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 698

HOWARD BRANKLIN CHAPMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 303–309; Pet. App. 13–19) is reported at 271 F. 2d 593.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1959 (R. 310; Pet. App. 11). A petition for rehearing was denied on December 17, 1959 (R. 314; Pet. App. 12). By order of Mr. Justice Black the time for filing a petition for a writ of certiorari was extended to February 14, 1960. The petition for a writ of certiorari was filed on February 11, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was properly found guilty of possessing property intended for use in violating the internal revenue laws where he thought the persons to whom he sold sugar were bootleggers, but they were in fact federal agents.

2. Whether the jury properly found that petitioner was not entrapped.

3. Whether there were errors in admission of evidence and in the charge to the jury.

STATUTE INVOLVED

26 U.S.C. 5686(a) provides as follows:

> It shall be unlawful to have or possess any liquor or property intended for use in violating any provision of this chapter or regulations issued pursuant thereto, or which has been so used, and every person so having or possessing or using such liquor or property, shall be fined not more than $5,000, or imprisoned not more than 1 year, or both.

STATEMENT

After a jury trial, petitioner was found guilty under count 2 of an indictment which charged him with possessing on November 26, 1957, quantities of sugar, yeast, and rye meal, the property "being * * * intended for use in the manufacture and production of non-tax-paid distilled spirits," in violation of 26 U.S.C. 5686, *supra* (R. 2–3).[1] The court suspended

[1] Petitioner was found not guilty on count 1 which charged him with possessing on November 21, 1957, sugar and yeast in violation of 26 U.S.C. 5686 (R. 2–3).

the imposition of sentence and placed petitioner on probation for one year (R. 296–297). On appeal, the court of appeals affirmed (R. 310).

The evidence adduced at the trial may be summarized as follows:

Federal alcohol tax investigators learned from a reliable source that large quantities of sugar—an important ingredient in the making of liquor—could be purchased at petitioner's bakery in Atlanta, Georgia (R. 10, 117–118). On October 23, 1957, Investigator Weems spoke with petitioner on the telephone about buying some twenty bags of sugar a week, saying that he did not want federal agents to discover his purchases. Petitioner told him not to worry; that he received sugar through railroad salvage on which there were no reports; and that, when he purchased sugar on which reports were made, he could say he used it at the bakery (R. 10–13). The following day Weems told petitioner that he was not yet ready to buy because his still had been raided. Petitioner told Weems to let him know when he was ready. Petitioner wrote on a piece of paper that the price would be $300 for twenty-one bags, which Weems said was too high (R. 13–14). Petitioner told Weems that the sugar could be loaded on to Weems' truck by switching tags (license plates), since petitioner had a legitimate use for the sugar (R. 15).

On November 21, Weems and another officer purchased twenty bags of sugar from petitioner. Petitioner used the officer's truck with his own tags to get the sugar. He asked the officers what they did with

the bags, and when told that they were burned, said that was good because the bags could be traced (R. 16–21). On November 26, 1957, Weems arranged to buy sugar, rye, and yeast, delivery to be made at petitioner's home. The officers loaded sugar on to their truck from petitioner's truck (R. 22–23). While the sugar was being loaded, petitioner was arrested (R. 111). On his way into town, petitioner told the arresting officers that he was selling sugar to recover financial losses (R. 242).

Subsequently, petitioner visited Roy Kelley, a local supervisor of the Internal Revenue Service, several times in Kelley's offices. During one such visit, petitioner told Kelley that "he didn't know whether or not the particular officers planned to use this material for moonshine, but he was reasonably certain that that was the use to which it would be put" (R. 166).

Petitioner, when he took the stand, said that he thought that the undercover agents bought sugar from him either to inform his competitors as to the price he was asking for sugar or to report to the Health Department whether his place of business was sanitary (R. 217–219). He admitted that the officers said that they were bootleggers, but only after they purchased the sugar (R. 209, 222).

In rebuttal, the government, over petitioner's objections, introduced a recording of the officers' conversations with petitioner on November 21 and 26, 1957. The recording was made by a miniature wire recorder carried by one of the agents (R. 245–248, 255–260). The officer who transcribed the transmissions testified that the tape was a faithful reproduc-

tion of the wire (R. 244). The transcription and recording had been kept in a locked safe (R. 259).

ARGUMENT

1. On the issue of intent the judge charged, in part (R. 285).

> Now, one of the essential elements of this offense is that the defendant in having such property knowing it to be intended for use in producing liquor without the payment of taxes thereon. The ownership of the property is immaterial, but possession of the same with knowledge of its intended use to produce non-tax paid liquor is sufficient.

Thus, the jury in finding petitioner guilty under count 2 necessarily found that petitioner possessed the property with the knowledge that it was intended to be put to an illegal use—precisely the intent required under 26 U.S.C. 5686(a). This finding is fully supported by the evidence that petitioner intended the property to be used for making illegal whiskey. While, of course, the officers did not intend to use the sugar and other materials in this manner, the statute clearly makes only the intention of the seller, and not that of the buyer, relevant. See *Weinstein* v. *United States*, 293 Fed. 388, 389 (C.A. 1).[2]

---

[2] The court refused to grant the government's more explicit instruction that the defendant could have intended an illegal use even though the officers themselves did not intend to use it illegally (R. 290–291). Nonetheless, the jury clearly was required to find petitioner's illegal intent in order to convict petitioner under the instruction actually given and petitioner naturally did not object that the court gave an instruction more favorable to him.

2. The issue of entrapment was submitted to the jury under full and proper instructions (R. 286–287). The court charged that the jury must find petitioner not guilty if "the inception of the crime originated in the minds of the Federal officers" and the petitioner "was induced * * * to commit the offense" (R. 287). Substantially the same instructions were repeated when the jury asked to be recharged on the issue of entrapment after it had deliberated for a time (R. 292–293). The jury had ample basis for finding that petitioner was ready and willing to commit the offenses charged, and that the government officers merely provided the means for realizing his preexisting purpose. See *Masciale* v. *United States*, 356 U.S. 386; *Sorrells* v. *United States*, 287 U.S. 435, 451.

3. The various trial errors claimed by petitioner raise no issue of substance.

a. Kelley testified that petitioner called him on the telephone with reference to obtaining possession of the vehicle seized from him. On cross-examination, Kelley admitted that he had not known petitioner's voice when petitioner called (R. 171). The court of appeals concluded, however, that "there were sufficient facts and circumstances to identify [petitioner] as the person with whom the telephone conversation with agent Kelley was had" (Pet. App. 16). More-

over, Kelley's testimony concerning the telephone call was clearly not prejudicial and merely provided background to explain how petitioner later happened to make the admission to Kelley personally (see *supra*, p. 4).

b. Before admitting the tape recording of the conversations between petitioner and the officers, the judge took testimony as to how the recording was made and kept (see *supra*, pp. 4–5). After the recording was played, the judge instructed the jury that any conversations between the officers themselves would not be admissible, and that the statement made by the officer when he placed petitioner under arrest was not binding (R. 280). Thus the court ascertained that the tape recording was an accurate reproduction and carefully limited the jury's consideration by appropriate instructions. In such circumstances, the recording of such face to face conversations constitutes proper evidence. *On Lee* v. *United States*, 343 U.S. 747.

c. After the court had recharged the jury on the issue of entrapment at the jury's request, the court went on to state that it was desirable for the jury to reach a verdict and that therefore the jurors should give deference to, and fully consider, each other's views (R. 293–294). Petitioner's counsel noted an exception "for the purpose of the record" (R. 295). The charge was not coercive, but was a reasonable explanation of the manner in which a jury is expected to function. See *Allen* v. *United States*, 164 U.S. 492, 501.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
MALCOLM R. WILKEY,
Assistant Attorney General.
BEATRICE ROSENBERG,
FELICIA DUBROVSKY,
Attorneys.

MARCH 1960.

U. S. GOVERNMENT PRINTING OFFICE 1960

FILE COPY

FILED
MAR 14 1960
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October TERM, 1960

NUMBER 648

HOWARD BRANKLIN CHAPMAN
Petitioner

vs.

UNITED STATES OF AMERICA

On writ of certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF ON BEHALF OF PETITIONER

SCOTT WALTERS, JR.
GUY R. DUNN
G. SEALS AIKEN
2783 N. Main Street
East Point, Georgia

INDEX

	Page
Reference to Official Report	1
Jurisdiction	2
Statutes Involved	3
The Questions Presented	4
Statement of the Case	6
Summary of Argument	8
Argument	10
Entrapment	10
Inadmissibility of Evidence	12
Motion for Judgment of Acquittal	13
Conclusion	14

TABLE OF CASES AND STATUTES CITED

Page

Section 5686, Title 26, U.S.C.A. 3

Lee v. United States, 343 U.S. 747, 96 L.ed 1270 12

IN THE

SUPREME COURT OF THE UNITED STATES

Term. 1960

NO.

HOWARD BRANKLIN CHAPMAN
Petitioner

vs.

UNITED STATES OF AMERICA

On writ of certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF ON BEHALF OF PETITIONER

REFERENCE TO OFFICIAL REPORT

The opinion of the United States Court of Appeals for the fifth Circuit in this case is officially reported in Federal Reporters Second Series.

JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked under 28 USCA 1254 (1), and under and by virtue of title 18 USC 3772 and within the time provided for under rule XI of the Rules of Practice Procedure promulgated May 7, 1934, 292 U. S. 661, 666, 54 S.C.T. XXXIX) in Rule 22 (2) of the Supreme Court rules.

Jurisdiction of this court is invoked because the United States Court of Appeals for the Fifth Circuit has decided an important question of Federal Law, which is not, but should be, settled by this court and has so far departed from the accepted and usual course of judicial proceedings, and so far sanctions such a departure by a Lower court, as to call for an exercise of this court's power of supervision and has misconstrued a decision of this Court involving the construction of a statued of the United States, and has, by it's ruling, rendered the plea of entrapment a jury question beyond the control of the court so as to allow a man aquitted on one (1) count to be convicted of a count alleging an almost identical transaction between the same parties only a few days later, and has allowed the trial court to use in evidence a recording of a conversation made by a concealed miniature minafor recorder on the person of a Federal agent without the knowledge or consent of the defendant and without identification of the participants in the conversation and with a portion of the conversation taking place outside of the presence of the defendant and with portions of the conversation being inaudiable when amplified in the presence of the jury, and has allowed a conviction to stand where the United

States Attorney in open Court stated to the Court that on the evidence admitted and the law given in charge the defendant should be aquitted.

The judgment of the Court of Appeals was entered on the 10 day of November, 1959. A petition for rehearing was denied on the 17 day of December, 1959. The petition for certiorari was filed and docketed in the Supreme Court of the United States on the 15 day of January, 1960, within thirty (30) days after an order extending the time for filing signed by Honorable Hugo L. Black, Associate Justice of the United States Supreme Court entered on the 15 day of December, 1960. The order extending the time for filing said petition for certiorari having been entered within thirty (30) days after the date of the final judgment of the United States Court of Appeals for the Fifth Circuit denying the petition for rehearing.

STATUTES INVOLVED

SECTION 5686, title 26, USCA.

THE QUESTIONS PRESENTED

The United States Court of Appeals for the fifth Circuit erred in deciding that the defense of entrapment is entirely a jury question on an indictment for possession of property intended for use in violating the Internal Revenue Laws relating to non-tax paid distilled spirits, in violation of section 5686, title 26 USCA where the indictment contained two (2) counts. One alleging a transaction and possession on the 21st day of November, 1957, and the second on the 26th day of November, 1957, and where the Internal Revenue Offices were the initiating principals in each transaction without any evidences of previous transactions by the accused and where the jury found the accused not guilty on count one (1) alleging possession on the 21st day of November, 1957.

The Court of Appeals erred in finding the trial court properly admitted into evidence and allowed by amplification to be played in the presence of the jury a tape recording, between the undercover agents and the accused on each transaction, made by use of a miniature minafor recorder carried in the pocket of one of the agents, a part of which recording was inaudible and a part of which contained conversations between the agents out of the presence of the accused. The Court instructed the jury prior to it's playing "... give it just such weight and credit that you think it's entitled to receive," and after the playing "... I instruct you to be very cautious to observe that testimony (conversation between the officers themselves) and do not consider any conversation that took place between the officers not in the hearing or presence of the defendant...."

The Court of Appeals erred in failing to reverse the

conviction of the defendant on count two (2) of the indictment and instructing the trial Court to enter a judgment of acquittal not withstanding the verdict on the motion by defendant's counsel on the basis of the statement by the Assistant United States Attorney prosecuting in open Court, that the jury would not be authorized to convict the defendant on either count on the evidence submitted and the court's charge as to the Law.

STATEMENT OF THE CASE

The petitioner was indicted on two (2) counts charging possession of property intended for use and violating the United States Internal Revenue Laws relating to non tax paid distilled spirits, in violation of section 5686 Title 26 USCA. He was convicted on the second count and sentenced to one (1) year probation from which judgment he appeals.

The government's evidence indicated that on October 23, 1957, an investigator Weems telephoned Chapman's Bakery and spoke to the petitioner who was the proprietor. At that time the sale of sugar by petitioner to the investigator was discussed and the security necessary. The following day the investigator visited petitioner at the Bakery and further discussed the sugar. On the 7th day of November the investigator together with an investigator Denny again went to the Bakery and petitioner stated that he had been sick and that they should call him the following Monday. Two weeks later the officers returned and made a purchase of sugar. Thereafter on the 26th day of November, investigators Weems again telephoned petitioner asking to purchase additional sugar. That evening at approximately 8:00 o'clock P. M. the agents went to petitioner's residence and purchased a portion of a load of sugar parked at the curb in front of petitioner's house. Thereafter and prior to leaving the scene an arrest was made by other alcohol and tobacco tax agents.

On departing for jail with the officers petitioner told them that he was selling the sugar to recover from business losses that he had sustained. Thereafter petitioner

admitted to the supervisor in charge of the alcohol and tobacco tax division that he was reasonably certain that the material was to be used in making moonshine whiskey.

Petitioner denied a large portion of the conversation about whiskey but admitted that after the first transaction investigator Weems talked about being a Boot legger as did the other investigator. He also stated that he told them "if you're going to make liquor out of it, you better pay a tax on it, I suppose."

The rebuttal for the government consisted of the recording made by the officers on a pocket size minafor wire recorder at the time of the transactions.

The petitioner was convicted on count two (2) and acquitted on count one (1). At the conclusion of the government's evidence a motion for a directed verdict of acquital was made on behalf of petitioner. Also after the judgment of guilty on count two (2) and not guilty of count one (1) a motion for judgment of acquital not withstanding the verdict was made as to count two (2).

The plea of entrapment was insisted on through out the trial by petitioner.

SUMMARY OF ARGUMENT

1.

The petitioner under a general plea of not guilty raised the defense of entrapment. The jury after receiving a recharge at their request on the law of entrapment found the defendant not guilty on count one (1) and guilty on count two (2) which occured some five (5) days later. An examination of the record reveals that the jury sustained the plea of entrapment as to the first count and the law of the case this being established it is obvious that as a matter of law the plea of entrapment was sustained as to count two (2).

2.

The use of a tape recorder by the officers in the instant case without the knowledge of the defendant permitted them to unlawfully invade his property and guide the conversation so that he would make admissions or statements that they could make into admission and even gave them the privilege of editoralizing out of his presence in order to take the words he spoke and make of them a snare with the view in mind of using them against him in court in the event a criminal case was made. Evidence of this sort is not only a potent invasion of privacy but is also a violation of the rules of fair play and in the fariest method of obtaining confession without informing the defendant of his constitutional rights.

3.

When in the course of judicial proceeding the United States Attorney states as follows, "your Honor if that

is the law of this court the evidence is clear that they didn't have such intent and we believe that in that event the court should grant a judgment of "acquital" such is a judicial admission and would demand a finding of not guilty.

ARGUMENT

Part I

ENTRAPMENT

This court in the case of *C. V. SORRELLS vs. UNITED STATES OF AMERICA*, 287 US 435, 77 L ed 413 (1932) held that the question of entrapment is properly raised on a plea of not guilty. The court defined the plea of entrapment and quoted the statement of Circuit Judge Sanborn in the case of *Butts vs. United States*, 273 Fed. 35 as follows: "the first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite and to create crime for the sole purpose of prosecuting and punishing it."

The case of *Joseph George Sherman vs. United States of America* 356 US 369, 2nd Led. 2D 848 (1958) this court recognized and defined the law of entrapment and held that under the facts in that case the defense of entrapment was established as a matter of law.

In the instant case the petitioner engaged in one transaction and five days thereafter engaged in another transaction each involving the sale of sugar and yeast to government agents. As to the first transaction, the plea of entrapment was sustained by the jury and the petitioner acquitted. As to the second transaction, the petitioner was found guilty by the jury.

At no time did the petitioner seek out the officers but on each occasion he was sought out. Once having made a sale he found himself in a position where few

would decline to do business further and they with only grave misgivings.

The government agents having set the trap and lured the petitioner into it set it again and lured him in once more. The grave question in the mind of the jurors is born out by the fact that they ask a recharge on this subject.

Between the first transaction and the second, not one shred of evidence exists that moved the petitioner into the position of the procuring agency for the other transaction. His innocence having been established by the jury as to the first transaction it follows as a matter of law that the second transaction was that of the officers and not that of the defendant.

Part II

INADMISSIBILITY OF EVIDENCE

Admisibility of a pocket tape recorder carried by the officers for evidentiary purposes in evidence when a portion of the recording was made after the presence of the accused.

The use of a concealed recording devise in the instant case went much further than the use of a pocket radio in the case of *Lee vs United States of America*, 343 US 747, 96 Led 1270 (1951), where such was held to be competent evidence. In the instant case two well trained officers knowing of the presence of the recorder carefully guided the conversation so as to induce admissions for possible use in Court without the petitioner being advised as to his rights or having any knowledge of the existence of the recorder. They even conversed out of his presence knowing that such could not be used as evidence in any court. The quality of the recording was such that even with amplification it was inaudiable at points. It's quality was such that the two records in which it was used on two of the defendant's separate trials differ at points.

Petitioner strongly feels that both the fourth and fifth amendments to the Constitution of the United States are violently torn by this type of evidence. Aside from the questions of constitutional privilege this recording is not a chance recording by children playing games but is a deliberate premediated act by two skilled and highly trained officers.

Petitioner concedes that a criminal prosecution is more than a game but feels that the evidence complained of should be excluded as a question of sound policy in the administration of the law.

Part III

MOTION FOR JUDGMENT OF ACQUITTAL

On the United States Attorney's statement that the court on the basis that the evidence and it's charge should direct a verdict of acquittal.

A retraxit is "an oral renunciation by plaintiff in open court of his suit or cause of action. It differs from a dismissal or nonsuit in that in the latter the plaintiff may generally begin his suit again, whereas by entering a retraxit the plaintiff forever looses his cause of action." 17 Am Jur 101. Black's Law dictionary citing three Blackstone Commenteries 296 defines it as an open renunciation by a plaintiff of his suit in court, made when the trial is called on, by which he forever looses his action, or is bared from commencing another action for the same cause.

In criminal law usually the term "nolle prosequi" is used. This is voluntary withdrawal by the prosecuting authority of present proceeding under a particular bill. 14 Am Jur 965.

In the instant case the United States Attorney's statement was made in open court prior to verdict. Such was a renunication of the cause and of the case and a judgment of acquittal or a dismissal should have been entered.

CONCLUSION

Petitioner having been acquitted on count one (1) and evidence indicating that the United States agents were the moving factors as to the second transaction the court erred in not directing a judgment of acquittal. The manner of preparation in use of the tape recorder by skilled officers was at best inconsistent with fair play. The United States Attorney's statement that on the evidence and the charge (which the court of Appeals referred to as a fair charge) the defendant should be acquitted was a renunciation of his cause which should have been honored.

The trial court erred in refusing to grant a judgment of acquittal and the United States Court of Appeals erred in affirming the trial court on these rulings. The judgment of the United States Court of Appeals for the Fifth Circuit should be reversed and the trial court ordered to enter a judgment of acquittal.

Respectfully submitted,

Scott Walters, Jr.
Guy R. Dunn
G. Seals Aiken
2783 N. Main Street
East Point, Georgia

February, 1960